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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARSHALL P. SAFIR
Petitioner,

v.

ANDREW L. LEWIS
in his representative capacity as
Secretary of Transportation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Marshall P. Safir
Pro Se

271 Grand Central Parkway
Floral Park, NY 11005
212-225-0210

September 22, 1982

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QUESTIONS PRESENTED

I.

Does Section 810 of the Merchant Marine Act of 1936 (46 U.S.C. Sec. 1227) waive sovereign immunity and afford an explicit treble damage remedy for monetary relief against the United States to a person injured in his business or property by government conduct forbidden by the section?

II.

When a private plaintiff has been deemed to nave prevailed in a lawsuit against the United States and its officials under 46 U.S.C. §1227 is he entitled to recover his cost of the suit including reasonable attorneys fees?

LIST OF PARTIES

This petition is being filed on behalf of Marshall P. Safir. The respondent is the Secretary of Transportation and his constituent agency the Maritime Administration. The intervenor-carriers are:

Lykes Bros. SS Co. Inc. a subsidiary of LTV Corp.

Moore McCormick Steamship Co. a subsidiary of Moore McCormick Resources Inc.

Farrell Lines Inc. and its affiliate *American Export Lines Inc.*

United States Lines, Inc.

Prudential Lines Inc. successor to Prudential-Grace Lines Inc.

American President Lines Inc a subsidiary of Natomas Corp.

INDEX

Page

Questions Presented for Review i

Citations ..... iv,v,vi

Opinions Below 1

Jurisdiction 2

Relevant Federal Constitutional Provisions And Statutes 2,3

Statement of the Case 3

Reason for Granting the Writ 4

Conclusion 15

Appendix A

Order of the D.C. Circuit entered on May 5, 1982 dismissing federal appeal A-1

Appendix B

Order of the D.C. Circuit denying rehearing *en banc* of June 3, 1982 ..... A-2

CITATIONS

Safir v. Klutznick, 526 F. Supp. 821 (1981) 1,3

Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977) cert. denied, 434 U.S. 820 (1977) 1,3,12

U.S. ex rel Safir v. American Export Lines et al., 579 F.2d 742 (2nd Cir. 1978) cert. denied, 441 U.S. 943 1,4,8

Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1969) ...Passim

Safir v. Gibson, 432 F.2d 137 (2nd Cir. 1970) cert. denied 400 U.S. 850 (1970) 3,16

Alyeska v. Wilderness Society, 421 U.S. 240 (1975) 4,9

Christianberg Garment Co. v. E.E.O.C. 434 US 412, (1977) 4,5

Sharrock v. Harris, 473 F. Supp. 1173 (E.D.N.Y. 1979) 6

Staten v. Housing Auth. Pittsburgh, 638 F.2d 599 (1980) (3rd Cir. 1981) 6

NRDC v. EPA 484 F 2d 1331, (1st Cir. 1973) 6,9,10

Mills v. Electric Autolite, 396 U.S.375 (1970) 6

Hall v. Cole, 412 U.S. 1, 9, 10 (1972) 6,9

Photo Data Inc. v. Sawyer, 533 F. Supp. 348 (D.C.D.C. 1982) 7

Hensley v. Eckerhart Docket 81-1244 (1982) 8

Fleischman Distilling Corp. v. Maier Brewing Co. 386 US 719, (1967) 9

Knights of the KKK v. East Baton Rouge Parish School 643 F.2d 1034 (5th Cir. 1981) 9

F.D. Rich v. Ind. Lumber Co. 417 US 116, (1973) 9

Parker v. Mathews, 411 F Supp. 1059, 1064 (D.D.C. 1976) 10

Bradley v. School Board of Richmond, 416 U.S. 696 (1974) 10

Cuneo v. Rumsfeld, 553 F 2d 1360, 1366-1367 (D.C. Cir. 1977) 10

Hardin v. Kentucky Utilities 390 US 1, (1967) 11

Chicago Junction Case 264 US 258 (1924) 11

Safir v. Gulick, 297 F Supp. 630 (1969) 9,11

Simon v. Eastern Kentucky Welfare Rights Org. 426 U.S. 26 (1976) 11

Sea Land Service, Inc. v. The Alaska Railroad et al 659 F.2d 243 (D.C. Cir. 1981) *cert. denied* 102 S. Ct. 1294 (1982) 13,14

United States v. Cooper, 312 U.S. 600, 606 15

US v. Brown, 381 U.S. 437 16

Hazel-Atlas Glass v. Hartford-Empire Co. 322 US 238 (1944) 8

Root Refining Co. v. Universal Oil Products Co. 169 F.2d 514 (3rd Cir. 1948) *cert denied sub-nom Universal Oil v. Whitman*, 335 U.S. 912 (1949) 8

STATUTES

46 U.S.C. §1227 ..... Passim
28 U.S.C. §1361 10
31 U.S.C. §231, 232, 235 4
§35, Lanham Act 6
28 U.S.C. §2412abcd, 2414, 2417 6,7,8,9
5 U.S.C. §501, 551, 554 7
28 U.S.C. §1920 8
§304, Clean air act 11
15 U.S.C. §15(a) 15
15 U.S.C. §1 14

AUTHORITIES

H.R. Report 96-1418 Equal Access to Justice Act 7

"Failure to Prosecute" 75 Col L.R. 130 (1977) 13

"Statutory Interpretation" 95HLR 892 (1982) 16

American Constitutional Law L.A. Tribe Chap 10 'Model of Governmental Regularlity- 16

"Attainder" 72 Yale Law Journal, 330 16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The order of May 5, 1982 (without opinion) (App. A-1) dismissed the appeal the appeal of the Secretary of Transportation on the federal appellants own motion. The petition for rehearing was denied June 3, 1982 (App. A-2). The District Court opinion and judgment from which the Secretary appealed is reported as *Safir v. Klutznick*, 526 F. Supp. 921 (D.C.D.C.) (1981). This decision by Judge William B. Bryant was entered on remand of *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir. 1977) *cert. denied*, 434 U.S. 820 (1977). A related concurrent action resulted in the opinion in *Safir v. Blackwell and American Export Lines et al.*, 579 F.2d 742 (2nd Cir. 1978) *cert. denied sub nom*, United States *ex rel. Safir v. American Export et al.*, 441 U.S. 943.

JURISDICTION

This petition is being filed pursuant to an extension of time granted by the Chief Justice to September 23, 1982. The Court's jurisdiciton is invoked under Title 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Article I, Section 9 U.S. Constitution Clause 3

"No Bill of Attainder or *ex post facto* Law shall be passed."

Title 46 U.S.C. §1227

Agreements with other carriers forbidden; withholding subsidies; actions by injured persons for damages

It shall be unlawful for any contractor receiving an operating differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert wit another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefore in

any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. June 29, 1936, c. 858 §810, 49 Stat. 2015.

STATEMENT OF THE CASE

The petition for writ of certiorari is directed at the order of dismissal of the D.C. Court of Appeals filed May 5, 1982 of an appeal by the Secretary of Transportation. Petition for Rehearing en banc was denied June 3, 1982. The dismissal was granted perfunctorily without opinion on the federal appellant's own motion although this petitioner had opposed based on a statutory exception to the American Rule to be granted costs and fees under 46 U.S.C. §1227 the law under which he had substantially prevailed in the District Court. See *Safir v. Klutznick*, 526 F. Supp. 921 (1981). The dismissal was granted. The circuit court stated "no costs will be taxed."

This "single continuing lawsuit" (See *Safir v. Kreps*, 551 F.2d 447, 450 *cert. denied*, 434 U.S. 920 (1977)) was initiated in 1968 in the form of an action for mandamus under 28 U.S. §1361 to require the termination of subsidy payments to certain ocean carriers who had been found by the Federal Maritime Commission to have violated certain anti-competitive sections on the Shipping Act of 1916. *See Safir v. Gibson*, 417 F.2d 972 (2nd Cir. 1969) and *Safir v. Gibson*, 432 F.2d 137 (2nd Cir. 1970) *cert. denied* 400 U.S. 850 (1970).

As a result of the decisions in the 2nd Circuit the Maritime Subsidy Board decided to follow an "expensive and time consuming course" in effect a war

of attrition against this petitioner. *See Safir v. Blackwell*, 579 F.2d 742, 744 *cert. denied*, 441 F.2d 943 (1978).

The Second Circuit in *Safir v. Blackwell, supra* prior to APA review by the U.S. District Court of the District of Columbia rejected Safir's false claims actions under 31 - U.S.C. §§231, 232, and 235 stating that in endeavoring the force the recovery of the subsidies illegally paid he would have been required to incur the complete burden of the expense of the prosecution, *Safir v. Blackwell,supra*, p. 747. This he has indeed done.

The federal motion to dismiss its own appeal followed a motion by this petitioner in the court below to dismiss all government and carrier appeals under the "unclean hands" doctrine. Petitioner's motion was denied without prejudice to renew after oral argument. This argument is now set for October 29, 1982. The "unclean hands" issue maintains its vitality in the court below — see order of May 5, App. p. 1. as does the issue of compensatory recovery to the petitioner measured by the profits that accrued to the violators by the virtue of the illegal payments during the violative period. The issues of "common fund" and government as "stakeholder" of the funds recovered through petitioner's efforts are also subordinate to whether a U.S. treble damage liability exists under the waiver of sovereign immunity in 46 USC §1227.

Reasons for Granting the Writ

The issue in this petition is the effect of the D.C. Circuit's order that "no costs will be taxed" on the explicit waiver of sovereign immunity of the United States under Sec. 810 of the Merchant Marine Act, 1936 (46 U.S.C. §1227). The refusal of the court below to grant costs of the suit to the prevailing plaintiff is in blunt contradiction to this court's holding in both

Alyeska Pipeline Co. v. Wilderness Society 421 U.S. 240, 260-261 (1975) and *Christianberg Garment Co. v. E.E.O.C.* 434 U.S. 412, 415 ft. n. 5 (1977).

In "Alyeska" this court examined exceptions to the American Rule.

The court determined:

"What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and *explicit* provisions for the allowance of attorney's fees under selected statutes granting or *protecting various federal rights*" (emphasis added) "Alyeska" supra p. 260.

Specifically footnoted was the Merchant Marine Act of 1936 §810 49 Stat. 2015, 46 U.S.C. §1227, which states the prevailing plaintiff "shall recover threefold the damages by him sustained, the *cost of the suit* including reasonable attorneys fees". This court two years later was more specific in *Christenberg Garment Co.* v. *E.E.O.C.* where it stated that 46 U.S.C. §1227, made fee awards *mandatory* to prevailing plaintiffs "Christianberg" supra p. 415.

Therefore the denial of the costs of the suit to this petitioner against the government who was the original and sole defendant in this case at inception in 1968 would, if not reversed, create an estoppel against a recovery of treble damages from the United States for his benefit and that of others under "common fund".

The federal appellants should not be permitted to withdraw without a clear determination by the court that Marshall P. Safir as the prevailing plaintiff below is entitled to not only those costs and attorneys fees that were his entitlement long imbedded in statutory right under 46 U.S.C. §1227 prior to *Alyeska v. Wilderness*

Society, 421 U.S. 240, 260, 261 (1975) and *Christianberg Garment Co. v. E.E.O.C.*, 434 U.S. 415, but to monetary damages explicitly mandated therein as well.

The dismissal should not stand to transfer the costs and fees to the intervenor - defendant violators. Cf. *Sharrock v. Harris*, 473 F. Supp. 1173 (E.D.N.Y. 1979) as cited on dismissal of federal defendants in *Staten v. Housing Auth. Pittsburgh*, 638 F.2d 599 (1980).

The full amount of subsidy recoveries due from all seven of them is now sub-judice in the court below. The illegal payments made to them during the violative period has been certified by the Maritime Administration at $225,000,000.

A "common fund" recovery of this amount trebled by United States contribution as money damages, costs and attorneys fees, would "make up to the victim for the burden which the earlier payments indirectly imposed on him" — "Congress felt that subsidy payments to violators did affect the competitive position of the victim". *Safir v. Gibson* 417 F.2d 972 at 977 (2nd Cir. 1969).

Regarding "common fund" — see "Lawyers and Involuntary Clients, Attorneys Fees From Funds, "John R. Dawson, 87 HLR 1597 also *NRDC v. EPA* 484 F.2d 1331, 1335 (1st Cir. 1973), *Mills v. Electric Autolite*, 396 U.S. 375 (1970). See *Hall v. Cole*, 412 U.S. 1, 9, 10 re "meticulously detailed remedies available to plaintiff", citing §35 of the Lanham Act as an example.

If this were merely a case of the prevailing plaintiff's right to costs and fees divorced from the sovereign immunity question, the recent statutory changes and case law in favor of granting these costs and fees are abundantly clear not only in civil rights and environmental cases but in the broad spectrum of amendments to 28 U.S.C. Sec. 2412 (1980).

The problem which the federal appellants tried to avoid with a "no cost" dismissal was the collateral estoppel effect of the Sovereign immunity waiver of costs on the Sovereign immunity waiver as to money damages. The relationship of one to the other in this unique statute is ineluctable.

I.
THE WAIVER OF SOVEREIGN IMMUNITY AS TO COSTS AND FEES

The prevailing plaintiff is not only entitled to his costs and fees under 46 U.S.C. §1227, but under the Equal Access to Justice Act P.L. 96-481 effective October 1, 1981.

Under this law he is entitled to reimbursement for all costs and expenses and attorneys and agents fees during the period of administrative adjudication 1969-1974 (5 U.S.C. Sec. 501, 551, 554). For the *judicial* expense of this "one continuing lawsuit" from 1968 and until the conclusion of this case his entitlements are codified at 28 U.S.C. Sec. 2412, abcd, 2414, 2417 as amended October 21, 1980.

The legislative history and intent of this Act is set forth in H.R.Report 96-1418. See 5 U.S. Code and Administrative News 1980 p. 4984-5003. The explanatory report is the vindication of this litigant's 17 year struggle acting on behalf of both his private and the public interest. See *Safir v. Gibson* 417 F.2d 972, 978 footnote 8 (2nd Cir. 1969). For early implementation of the new law see *Photo Data Inc. v. Sawyer*, 533 F.Supp. 348 (D.C.D.C. 1982).

The denial of costs is contrary to every recent precedent, indeed the issue of prevailing plaintiffs and the further refinement of interpretation as to whether these fees should be proportioned to reflect accurately

the extent to which a plaintiff has prevailed on the merits is to be heard in this term by this court's grant of certiorari (no. 81-1244) *Hensley v. Eckerhart* on March 1, 1982.

The regrettable fact is that issues of "unclean hands"[1] *and "bad faith" brought to the attention of the Chancellor below and their effect on the sovereign immunity waiver and money damages against the United States are the cause of the Federal Appellants hasty withdrawal and the plea for a "no costs" estoppel.*

Petitioner submits that just as there was not reasonable basis in law or in fact for the government to refuse to address new evidence of a criminal bribery conspiracy between a corrupt ex-President and a corrupt group of government contractors, *see U.S.* ex rel. *Safir v. American Export*, 579 F.2d 742, 746 footnote 5 *cert. denied* 441 U.S. 943 (1979), there was not substantial justification stated by the government which would show special circumstances that would make an award of costs to be unjust to the party whom Judge Bryant characterized as the prevailing plaintiff. The bad faith inherent in the former precludes the latter. Thus the standard of 28 U.S.C. §2412 (1966) is met as to costs enumerated in §1920 of this title prior to addressing money damages against the sovereign under Sec. 810 MMA'36.

Petitioner argues that where the sovereign has waived immunity to costs and where attorneys fees and monetary damages are explicitly stated and "meticulously detailed" in the statutory scheme,

[1]See *Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 U.S. 238 (1944). Also *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 54 (3rd Cir. 1948) Cert. denied, sub. nom. *Universal Oil v. Whitman*, 335 U.S. 912 (1949).

(including injunctive relief as well) a waiver of any one is a waiver of all. See *Hall v. Cole* 412 U.S. 1, 9, 10 (1973) citing *Fleischman Distilling Corp. v. Maier Brewing Co.* 386 U.S. 719, 721. In this litigation limited injunctive relief against the government was once granted in *Safir v. Gibson* 330 F. Supp. 225 E.D.N.Y. (1971). The government did not appeal.

In discussing the waiver of sovereign immunity under 28 U.S.C. §2412 as amended in 1980 the Fifth Circuit Court of Appeals set forth certain conclusions in *Knights of the KKK v. East Baton Rouge Parish School* 643 F.2d 1034 (1981) on page 1037.

> "This section has been consistently interpreted as preserving the sovereign immunity of the United States against awards of attorneys' fees absent a clear or express statutory waiver. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267-68, 95 S. Ct. 1612. 1626-27, 44 L. Ed. 2d 141 (1975). A waiver may arise in two ways. First a statute may explicitly impose liability for attorneys' fees upon the United States. Secondly, a *waiver of immunity may arise by 'necessary implication' from the context of the statute*. See *Natural Resources Defense Counsel, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973)."
>
> (Emphasis added)

The waiver therefore as to costs and attorneys fees applying as it does under the Equal Access to Justice Act with the specific statutory exception in Sec. 810 MMA'1936 is clear and unequivocal — *a fortiori* when the federal appellant withdraws his appeal and the District Court below has determined that the plaintiff was the prevailing party *F.D. Rich v. Ind. Lumber Co.* 417 U.S. 116, 129-130.

Further, the federal appellants in moving to dismiss their own appeal thereby conceded that the Secretary of Commerce and the Maritime Adminsitration abused their discretion as the plaintiff Safir alleged and the District Court confirmed. To the extent therefore that Safir is the party who has prevailed on what may be considered an interim order which is central to the case, a fee award is now appropriate. *Parker v. Mathews,* 411 F.Supp. 1059, 1064 (D.C.D.C. 1976). It is appropriate when he has not yet reached his ultimate objective of prevailing on all issues (such as the termination of subsidy payments to the violators and re-entry into the shipping business). *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974). Also see, *Cuneo v. Rumsfeld, 553 F.2d 1360, 1366-1367 (D.C. Cir. 1977) quoting Judge William Bryant on fees to prevailing plaintiffs.*

II

THE WAIVER OF SOVEREIGN IMMUNITY AS TO TREBLE DAMAGES

The waiver as it applies to money damages arises not only from the explicit inclusion of threefold damages in the second paragraph of section 810 with the costs, fees (and injunctive relief) but by "necessary implication from the context of the statute" itself.

This case was filed under 46 USC 1227 and 28 USC 1361 to compel the Administrator to perform an act or duty which was not discretionary with the Administrator. The termination of subsidy payments was mandatory, See *Safir* v. *Gibson* 417 F 2d 972, 977, similarly see *NRDC* v *EPA* 484 F 2d 1331, 1335 (1st Cir. 1973). In "Safir" however, beyond the statutory scheme in the Clean Air Act, *NRDC* v *EPA* supra, the federal defendant's duty made him an integral part of a federally protected statutory scheme for redress of anticompetitive

behavior by federal grantees. Not only were attorneys fees mandatory in Sec. 810 MMA where they were discretionary with the Court under 304 of the Clean Air Act but two forms of conduct are forbidden by the Merchant Marine Act Sec. 810.

1. Predatory conduct by the contractors which result in a finding of violation of paragraph one thereof.

2. The failure to perform a duty by the government official charged with the responsibility in paragraph two which was the cessation of subsidy payments to the violators. See *Hardin* v. *Kentucky Utilities* 390 US 1,6, (196/) citing the *Chicago Junction Case* 256 US 258 (1924).

The former is an injury inflicted on a person by the private contractors — the intervenors in this case. The latter is an injury inflicted on a person by government. Only the government was empowered to bar the subsidy payments. Therefore, the government is subject to treble damages and costs if there is a nexus between the length of time the duty to terminate was unperformed and the exclusionary effect it had on Safir's business re-entry and the continuing attritive effect on his business and property since 1968.

The validity of mandamus was recognized (see *Safir* v. *Gibson*, 417 F.2d 972, 978 footnote 7) in the reversal of *Safir* v. *Gulick*, 297 F. Supp. 630 (1969).

Counsel for the government argued that Congress did not intend the use of subsidy termination for competitive leverage. This nevertheless, was the formulation of the Second Circuit in Safir I and refined by the D.C. Appeals Court in *Safir* v. *Kreps*, supra, p. 451. Safir's standing was based on "profit" citing *Simon* v. *Eastern Kentucky Welfare Rights Org.* 426 U.S. 26 (1976).

Safir's leverage therefore did not rise parthenogenetically from his own brow but was the Brandeisian concept found inherent in Sec. 810 by both Circuits.

Safir's loss of leverage and resultant injury to his competitive potential and loss of profits from 1967 to this day is based on the refusal of the Maritime Agency to bar the payment of subsidy out of the funds of the United States to the violators at the very least until his viability as a competitor had been re-established. The

The Second Circuit held out subsidy renewal to violators on a return to paths of virtue. See *Safir v. Gibson* (1969) supra p. 977. The D.C. Circuit in *Safir v. Kreps,* supra p. 451 (1977) seemingly rejects even this potential apocatastasis.

> As stated by the DC Circuit court: "the Secretary's initial and allegedly continuing unwillingness to protect Safir's interests may well be a contributing factor to Safir's inability to reenter the shipping business — certainly Congress (in the Second Circuit's view) thought that *prompt termination* and recovery of subsidies would be of material assistance to the victim of predation."

It was the United States that barred Safir's reentry into business by denying the injunctive relief the statute mandated.

How long would the violating contractors who have received $4 Billion in subsidy payments since 1968 have been amenable to Safir's continued exclusion from rehabilitation and reentry if the funds were withheld?

The failure of the Administrator to perform his duty in Safir v. Gibson supra was discussed in "Reviewability of Prosecutorial Discretion - Failure to Prosecute" 75 Col. Law Review 130, 145, 157-158 (1977) by Prof. Roger P. Joseph at footnote 108:

> *"The decision not to enforce the conditions which Congress has set on the disbursement of funds is viewed as actively implicating the agency in the unlawful enterprise of the recipients".*

What more explicit waiver can be gleaned from the statute than to have its proscription against payment solely in the power of the sovereign who cannot be sued under the anti-trust laws. *See Sea Land Service, Inc. v. The Alaska Railroad et al* 659 F 2d 243 (D.C. Cir 1981) cert. denied 102 S. Ct. 1274. (1982).

This dichotomy between Sec. 810 and Sec. 4 of the Clayton Act as amended (15 USC Sec. 15) was examined in "Failure to Prosecute" 75 Col. Law Review 130, 158:

> "The private treble damage remedy under the anti-trust laws...may be considered sufficiently adequate to foreclose juducial review of the Justice Dept. or the FTC's decision not to prosecute ((footnote omitted). *Safir is distinguishable, however because of the direct government subsidization of the illegal activity which is usually not present in anti-trust violation.* The existence of an adequate private remedy will ordinarily prevent judicial review of failure by a prosecuting agency to pursue an available public remedy...Yet the "lack of other adequate remedy "standard cannot be

> applied mechanically as *SAFIR* and *MEDICAL COMMITTEE* (in fra) demonstrate, such a standard cannot substitute for careful analysis of congressional intent and public policy".

In the myriad of anti-competitive situations which would call for action under the Sherman and Clayton Acts none involve the systemic tripartite nature of a violation of Sec. 810 of the Merchant Marine Statute. Only in this statute is anti-competitive behavior by violating contractors tied to a mandatory obligation of a federal agency to cut off funding as a pro-competitive remedy.

The waiver of sovereign immunity is clear and the treble damage remedy against violators, or government, or both, is valid. There would have been no need for Section 810 if Congress felt that the "person" to "person" anti-trust laws were adequate to protect unsubsidized American flag operators without the added safeguard of federal agency obligation to terminate payments to persons who contravene the conditions of their grants.

Expressio unius est exclusio alterius

Furthermore, the wording of the Merchant Marine Statute Sec. 810, unlike the wording of the Sherman Anti-trust Act which confined actions to persons and corporations and not federal agencies, does not exclude suit against the United States.

The Solicitor General's brief (Docket No. 81-781) in opposition to a petition for certiorari in *Sea Land Service, Inc. et al.* v. *The Alaska Railroad et al.*, 659 F 2d 243 (D.C. Cir. 1981) *cert. denied*, 102 S. Ct. 1274 would be constrained to concede that the wording of Sec. 810 which omits "by any other person or corporation" would make "non-person" parties like the United States subject suit for damages under the waiver of

sovereign immunity.

As this court said in *United States* v. *Cooper*, 312 U.S. 600, 606 and to which the Solicitor General refers "The provision is that any person injured by violation of the Sherman Act 'by any other person or corporation' may maintain an action for treble damages against the latter. It is hardly credible that Congress used the term "person" in different senses in the same sentence. Yet *unless it did, the United States would be liable for suit* for treble damages". (Emphasis added)

Under Sec. 810 MMA'1936 - there is no requirement that the party sued be a "person" defendant because after predation the only party in a position to continue to injure a "person" plaintiff was the "non-person" United States. The statute relates the injury to "anything forbidden in this section" not limited to the actions of any other "person".

The wording of Sec. 810 preceded by 20 years the amended wording in 15 USC Sec. 15 (a) (1955). The Solicitor General maintains that this change in 1955 occurred solely to give the United States the right to sue for single damages. The wording of Sec. 810 unchanged since 1936, gives the United States no such right and yet maintains the treble damage liability in a waiver of sovereign immunity.

CONCLUSION

When this petitioner brought the issue of his reasonable expectations of subsidy recoveries, damages, fees and costs to the attention of the House of Representatives under the constitutional bar to Bills of Attainder when a concerted attempt was made to repeal 46 USC Sec.1227 in this session — the repealer was dropped from the bill which passed the House on September 15, 1982. The House Judiciary Committee recognized that "one of the functions of the clauses is to

provide protection through a direct restraint on the process of legislating for substantive rights and for politically weak groups, which might be subject to veiled assaults through legislation". *American Constitutional Law* by Lawrence A. Tribe (1978) "Model of Governmental Regularity" Chap. 10 p. 492 footnote 8 citing 72 YLJ p. 330,346,347 and *US* v *Brown* 381 US 437, 454 - note 29.

It has been said in "Statutory Interpretation", 95 Harvard Law Review 892, 900-907, (February 1982), this Court's "clear statement" model of statutory interpretation "redefines the judicial role by deferring to the relative competence of congressional judgment". If this be the case, this recent exercise is manifest recognition that a literal reading of 2nd paragraph of Sec. 810 was integral to the legislative intent.

If literalism had been followed in this litigation "no payment or subsidy of any kind would have been paid directly or indirectly" from 1970 to the present day and the United States would not have been liable for damages to the petitioner. Justice Douglas was of the opinion certiorari should have been granted at that time. See *Safir* v. *Gibson* 400 US 850 (1970).

For the reasons set forth above, petitioner prays that this court summarily reverse on the second question of the statutory exception on fees and costs and grant certiorari on the question of sovereign immunity on money damages under this singular statute, 46 USC Sec. 1227.

Respectfully Submitted

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September 22, 1982